the modern-day government contractor defense permits government contractors who have complied with government specifications to cloak themselves with the government's immunity from state liability. Because Goodrich simply complied with federal government disposal regulations, it has a valid defense to the Advocacy Team's allegations by virtue of its status as a government contractor.

Goodrich's use and disposal of perchlorate and solvent contaminated with propellant were carried out in strict compliance with government specifications. As such, the Supremacy Clause acts to pre-empt state law when, as here, it interferes directly with federally regulated activities. Moreover, Goodrich is shielded from liability in this case under the express provisions of the California Civil Code and the government contractor defense.

A. Goodrich Was Required to Burn Waste in Accordance with Federally Imposed Standards

The primary allegation asserted by the Advocacy Team is that Goodrich's use of a burn pit to dispose of waste perchlorate resulted in its release into the groundwater. The Draft CAO states that ammonium perchlorate was "dried and ground at the Property, before it was mixed with a polymer fuel-binder. . . ." Draft CAO at 12. As part of the production process, washout waste, including perchlorate and solvent contaminated with perchlorate and propellant, "was disposed of in Goodrich's on-site burn pits." *Id.* at 13. The Draft CAO identifies several process wastes that were burned in the on-site pit, including residual (unburned) scrap propellant from various rocket types and from Sidewinder salvage operations, *see Id.* at 13-15, "[a]ll [of which] was disposed of in Goodrich's burn pits located on the property." *Id.* at 15.[144] Likewise, the Advocacy Team's Memorandum of Points and Authorities identifies several additional process wastes that were allegedly incinerated in the on-site burn pit: perchlorate powder swept

[144] Although the Advocacy Team refers to "Goodrich's burn *pits*" in the Draft CAO and its Memorandum of Points and Authorities, the evidence plainly demonstrates that Goodrich only operated a single burn pit at Rialto. *See* Section III, *supra*.

up after grinding, Ad. Team P&A at 65; "TCE" and propellant slurry from mixing operations, *Id.* at 66;[145] test propellant that "*likely* contained perchlorate," *Id.* at 67 (emphasis added); excess propellant trimmed from the rocket motors, *Id.* at 68; and residual (unburned) scrap propellant resulting from failure of rocket motors, *Id.* at 75.

At paragraph 33(j), the Draft CAO provides some explanation of how the Advocacy Team believes the burn pit pathway caused groundwater contamination:

> Burns usually occurred at least once a week and sometimes three to four times per week. The ammonium perchlorate and TCE dumped into the pit was sometimes left for two or more days before it was ignited and burned . . . . Ash and residue were left in the open pits, exposed to precipitation. *Because the pits were earthen* and open to the elements, rain that fell into these pits would necessarily mix with the chemical residue and infiltrate into the gravelly soils and to the groundwater table.

Id. at 15 (emphasis added).[146] The Advocacy Team's Memorandum of Points and Authorities also purports to describe the process by which materials were disposed of in

[145] The Advocacy Team alleges that Goodrich used the solvent trichloroethylene ("TCE") to clean equipment contaminated with AP and propellants during the production process at Rialto. But the evidence does not support this conclusion. Although Goodrich did use some solvents in its production processes, including acetone and cyclohexanone, it did not use TCE. *See* Section III, *supra*. Even if Goodrich had used TCE at Rialto – and, again, the evidence proves that it did not – it is protected from any liability because the federal government required that any solvent contaminated with AP or explosive materials be incinerated in a burn pit.

[146] The allegations in the Draft CAO also suggest that very small quantities of propellant residue might have been rinsed onto bare ground. *See Id.* at 13 ¶ 33 (b) ("Small quantities of the washout waste were also disposed of directly to the bare ground outside of the mixer buildings."); *Id.* ¶ 33(m) ("*On some occasions*, the residue and unburned propellant were rinsed from the concrete test bay with a water hose, onto the bare ground.") (emphasis added). The Advocacy Team's Memorandum of Points and Authorities echoes these allegations. *See* Ad. Team P&A at 65 ("After sweeping, *some amount* of perchlorate remained on the grinding room floor."); *Id.* at 75-76 ("*On some occasions*, residue and unburned propellant was rinsed from the concrete test bay onto the bare ground using a water hose.") (emphasis added). Goodrich disputes these unsubstantiated allegations as there is no admissible evidence submitted to the Hearing Officer to support them. But even if there was some de minimis releases to the ground at the 160-Acre parcel as a result of Goodrich's former operations, those releases have not impacted groundwater nor do they threaten groundwater. The unrefuted evidence is that small quantities of perchlorate and solvent discharged to the ground will not migrate to a depth anywhere near the groundwater at the site (over 400 feet below ground surface) unless large quantities of free water are placed on top for extended periods of time. Therefore, Goodrich will focus this discussion on the mechanism of release on which the Draft CAO and the Advocacy Team's Memorandum of Points and Authorities primarily focus – the Goodrich burn pit.

the burn pit, *see* Ad. Team P&A, 76-77, claiming only in generalized terms that "[b]ased on the physical characteristics of the burn pits and the manner in which the burn pits were operated, the discharge of wastes containing perchlorate to Goodrich's burn pits would have resulted in the discharge of perchlorate and TCE to groundwater." *Id.* at 78.

Even if releases somehow did occur through the burn pit, Goodrich cannot be held liable under state law because it was *required* to utilize a burn pit pursuant to validly promulgated federal regulations that carry the force of law. For instance, the Draft CAO and the Advocacy Team's Memorandum of Points and Authorities condemn Goodrich for burning excess propellant in a pit that was earthen and open to the environment – yet burning on bare ground was *explicitly required* by applicable government ordnance regulations. The government mandated disposal specifications in an exercise of discretion that reflected the balancing of military effectiveness and safety, in effect establishing the standard of care to which Goodrich must be held. Goodrich is therefore protected from the Advocacy Team's claims because there is no evidence that releases of ammonium perchlorate and any solvent used in the production process occurred as a result of Goodrich's failure to follow the standard of care imposed upon it by federal law.

1. Goodrich Was Required to Burn Waste Ammonium Perchlorate

a. Goodrich Was Drafted Into the Cold-War Effort to Produce Solid-Rocket Boosters to Compete with the Soviet Union

The construction of solid-rocket motors for the military received heightened attention from the government during the Cold War because they were considered vital to the national defense strategy. In the late 1950s, the United States embarked on a massive development effort to advance the state of rocket and missile technology. This initiative received the highest priority among all national efforts, civilian as well as military, to close the perceived "missile gap" with the Soviet Union and to beat the Soviets to the moon. *See* Merrill Dec. ¶ 12. As part of this national effort, the government encouraged Goodrich to enter into the field to assist in the design, testing, and production of rocket motor propulsion systems at the Rialto site. *See* Wever Dec.

¶ 4 (stating that the Goodrich participation in the solid-rocket business began as a part of President Eisenhower's missile initiative). Goodrich contracted with the United States military to construct specific, smaller, solid-rocket motors from 1957 through 1964. *See, e.g.,* Ustan Dec. ¶ 14; Sachara Dec. ¶ 14. These solid-rocket motors included LOKI, ASP, and Sidewinder missiles. *See* Willis Dec. ¶¶ 14-16, Exs. 1, 2, & 24.

b. Ammonium Perchlorate Is a Vital Ingredient in Solid-Rocket Propellant

All solid-rocket motors use an oxidizer, which is a critical component of the propellant formulation because it provides the oxygen for combustion of the fuel. Wever Dec. ¶ 17. Ammonium perchlorate quickly gained acceptance as the best and most reliable oxidizer – a critical component of any solid-rocket propellant – to achieve the breakthroughs necessary to defeat the Soviets. *See* Merrill Dec. ¶ 12. In 1958, the U.S. Industry and Government Ad Hoc Panel convened and offered recommendations on developing solid-rocket technology using ammonium perchlorate and utilizing central coordination of the nationwide development effort, stating that propellants containing ammonium perchlorate "are now in the final stages of development and are suitable for long-range missiles." *See* Ex. 38 (stating that "[t]he high percentage of ammonium perchlorate is necessary to provide enough oxygen for high performance"). Some, but not all, of the propellant formulations produced by Goodrich at Rialto used ammonium perchlorate as the primary oxidizer. *See* Sachara Dec. ¶ 4; Wever Dec. ¶ 17.

The method of how ammonium perchlorate is ground and how it is handled during the production process has a significant impact on how a rocket motor will perform during flight. *See* Wever Dec. ¶ 22 (discussing how particle size impacts burn rate and rocket performance). Ammonium perchlorate made up approximately 70% of some rocket propellants produced by Goodrich. *See* Ex. 106. The solid-rocket propellants, and the details of how they were formulated, were considered classified information, and the contractor was required to take steps to protect this material and information. *See* Ex. 120. In this Cold War environment, the government certainly took a hard look at

activities that could affect the success of these vital weapon programs, such as the use of a "high percentage" of ammonium perchlorate in solid-rocket motors and the proper disposal of waste ammonium perchlorate generated as part of these activities.

c. The United States Military Carefully Controlled How Ammonium Perchlorate Was Handled and Destroyed

Because ammonium perchlorate was a central ingredient in the rocket propellant produced by Goodrich, both the military and Goodrich carefully monitored how it was handled and how it was destroyed. Military manuals and ordnance regulations instructed Goodrich to incinerate waste ammonium perchlorate at Rialto, and Goodrich complied with these federally mandated disposal standards.

Witness testimony confirms that ammonium perchlorate was handled very carefully during the grinding and mixing process because of the danger of explosions and fire. *See* Wever Dec. ¶¶ 21, 31 (discussing the use of non-sparking materials and conductive-soled shoes and flame-retardant overalls as safety precautions). Since ammonium perchlorate is an explosive, the military regulated ammonium perchlorate handling and disposal practices of its contractors through several manuals – with which Goodrich, as one of those contractors, was required to comply. *See* Merrill Dec. at ¶¶ 12, 14. These manuals included the Department of the Army Ordnance Corps, Ordnance Safety Manual – ORD-M 7-224, § 27 (1951), Ex. 118 ("Ordnance Manual"); the Departments of the Army & Air Force, Military Explosives Technical Manual – TM 9-1910/TO 11A-1-34 (Apr. 1955), Ex. 117 ("Explosives Manual"); the Department of the Army, Care, Handling, Preservation, and Destruction of Ammunition Technical Manual – TM9-1903 (Oct. 1956), Ex. 50 ("Destruction Manual"); and the Department of the Air Force, General Safety Procedures for Chemical Guided Missile Propellants – TO 11C-1-6 (Dec. 1956), Ex. 110 ("Safety Procedures").

In addition, the government could control the disposition of waste propellant and scrap because it owned these materials under the terms of its contracts with Goodrich. The contracts that Goodrich performed were typically cost-reimbursement contracts,

meaning that the government paid the contractor for all of its reasonable costs of performance – including the costs of purchasing ammonium perchlorate, solvents, or other raw materials necessary for the production of rocket propellant. For example, Contract NOrd-18966 was a cost-reimbursement contract for the production of Loki I propulsion units that was executed on June 4, 1959. *See* Ex. 119. In contract negotiations, Goodrich estimated that it would purchase up to 7,850 lbs of ammonium perchlorate to perform this contract. *See Id.*

Under the terms of the Allowable Cost, Fixed Fee and Payment clause, the government took ownership of any materials or products for which it paid the contractor – therefore, any ammonium perchlorate purchased or propellant made during the contract became government property as soon as it paid Goodrich for its costs in procuring them. Under the terms of the Government Property clause, the contract provided that:

> [u]pon completion of this contract, or at such earlier dates as may be fixed by the Contracting Officer, the Contractor shall submit to the Contracting Officer in a form acceptable to him, inventory schedules covering all items of Government Property not consumed in the performance of this contract, or not theretofore delivered to the Government, and shall deliver to make such other disposal of such Government Property as may be directed or authorized by the Contracting Officer. . . . The foregoing provisions shall apply to scrap from Government Property provided, however, that the Contracting Officer may authorize or direct the Contractor to omit from such inventory schedules any scrap consisting of cutting and processing waste, such as chips, cuttings, borings, turnings, short ends, circles, trimmings, clippings, and remnants, and to dispose of such scrap in accordance with the Contractor's normal practice.

Id. The government therefore maintained the right to direct the disposal of scrap propellant because it actually owned the material in question. Any disposal of scrap propellant under these contracts that was directed by the government would have been conducted in compliance with government explosive and ordnance manuals.

(1) Military Manuals Directed Contractors to Burn Waste Propellant

The Army Ordnance Manual specifically covers management and disposal of

"fuels and oxidizers" that are used in testing and production of "long range rockets and guided missiles." *See* Ordnance Manual at 15-1. The Manual describes the proper operation of "static test stands," such as those used at Rialto to test solid-rocket motors, stating that they "should be located at a minimum of intraline distance, not only from ready storage facilities but also at such distance from other test stands and the observation building." *Id.* at 15-6. The Manual specifies, in great detail, how the military and its contractors should dispose of excess explosives – including oxidizers and propellants. After discussing where to locate the destruction site, it instructs that:

> Dry leaves, and other extraneous combustible material shall be removed within a radius of 200 feet from the point of destruction. The grounds should be of well packed earth and shall be free from large stones and deep cracks in which explosives might lodge. Explosive materials *shall not be burned or detonated on concrete mats*.

Id. at 27-9 (emphasis added). The Manual also provides details on how to handle material awaiting destruction, personnel protection, training in running burn pits, and how to transport waste explosives. *See Id.* at 27-10 to 27-13.

The Army's Destruction Manual similarly directs contractors to incinerate excess propellant on bare ground in burn pits. Section 126(c) of the Manual specifies:

> Solid Propellant: Quantities of solid propellant may be destroyed safely if the propellant is removed from the containers and spread out on *bare ground* in a train 1 to 2 feet wide and not more than 3 inches thick.

Destruction Manual at 179-80, Ex 50 (emphasis added).

The Army and Air Force Explosives Manual directs that "[e]xplosives and propellants are burned in layers not more than 3 inches thick, . . . Loose, dry explosives may be burned in layers in direct contact with the ground. . . . " Explosives Manual at 315, Ex. 117. It further specifies that the:

> destruction of explosives by detonation should be carried out in a pit not less than 4 feet deep, the explosive being covered with not less than 2 feet of earth. Where space permits, the use of a pit may be dispensed with. . . . The destruction of explosives and propellants by burning or detonation is an operation to be carried out only with extreme care, because of the hazards involved in preparing the material for burning or detonation as well as the actual destruction.

> Careful attention should be given to the provisions of the Ordnance Safety Manual, ORDM 7-224, in carrying out such operations.

Id. at 316-317. The Explosives Manual also instructs that burning should be initiated by "blasting caps," *Id.*, the exact method used by Lou Staton at the Goodrich burn pit. *See* Staton Dep., 22:5-25:11.

Lastly, the Secretary of the Air Force promulgated "safety measures, safety standards, procedures, instructions, and precautions" with respect to the use of "highly reactive chemicals and products currently in use or that may be put in use for the propulsion of guided missiles or similar applications." Safety Procedures at 1, Ex. 110. The Safety Procedures require that "waste propellants shall be transferred at least daily to the waste propellant disposal area for destruction." *Id.* at 23. The Safety Procedures set forth requirements for burning of waste propellant, stating explicitly that burn areas must be "dug into the surface of the ground to contain the liquids to be disposed of by burning." *Id.*[147] These government manuals governed Goodrich's production of solid-rocket propellant at Rialto, mandating that it burn excess and waste ammonium perchlorate and propellant made with ammonium perchlorate as an oxidizer in its on-site burn pit.

(2) Goodrich Complied with These Manuals

It is also clear from testimony in this matter that Goodrich complied with these military manuals, and operated its burn pit in accordance with them. Goodrich monitored its own processes to ensure that it complied with the government's production and disposal requirements. *See* Willis Dec. ¶ 17 ("As the quality control inspector, I inspected the Loki and Sidewinder rockets in the finishing room to ensure that the

[147] In 1968, the Department of Defense restated many of these requirements in an omnibus manual directed solely at government contractors, entitled DoD Contractors' Safety Manual for Ammunition, Explosives and Related Dangerous Materials, DOD 4145.26M (Oct. 1968). *See* Ex. 91. This manual again required contractors to burn excess and waste propellants on "well packed earth . . . free from large stones and deep cracks in which explosives might lodge. Explosive materials *shall not* be burned or detonated on concrete mats." *Id.* at 15-5 (emphasis added).

rockets met *government-approved specifications.*") (emphasis added); Beach Dec. ¶ 7 (testifying that as an employee in quality control, he verified that "the mixed solid rocket fuel met specifications"). Moreover, Goodrich's performance and its compliance with applicable government specifications were subject to inspection by the military. *See* Willis Dec. ¶ 17 ("After I was finished, government inspectors would come to the Rialto facility to verify that Goodrich complied with those specifications."); Beach Dec. ¶ 10 (stating that "government inspectors would come to the Goodrich facility to approve the rockets for delivery").

Goodrich's compliance with these disposal regulations also is confirmed by Lou Staton, the Goodrich employee who oversaw operation of the facility's burn pit. Mr. Staton testified that the Goodrich burn pit was located about 150 feet from the Rialto facilities, and that it was at least six feet deep. *See* Staton Dep., 22:3-23:3 (describing the location of the burn pit, the procedures for burning, and the frequency of burning of waste propellant); *see also* Wever Dec. ¶¶ 53-60 (addressing burn pit procedures and stating that the burn pit complied with the "industry standard and government standards for disposing of such waste"); Ustan Dec. ¶ 8 (confirming that "I never saw a buildup of waste-like material in the burn pit"). Indeed, even the allegations in the Draft CAO, if taken as true, support the notion that Goodrich complied with relevant military requirements to burn excess ammonium perchlorate and propellant on *bare ground.*

2. Goodrich Was Required to Burn Waste Solvent That Had Been Contaminated with Ammonium Perchlorate and Propellants

Pursuant to these regulations, Goodrich also was required to burn any solvent contaminated with explosives such as ammonium perchlorate or propellant. As alleged by the Draft CAO, any solvent used by Goodrich was incinerated in the burn pit o*nly* after it had been used to clean ammonium perchlorate or propellant, and was therefore contaminated with the explosive substance. *See* Draft CAO at ¶ 33(b) (washout waste containing solvent and residue ammonium perchlorate placed in the burn pit); *Id.* at 33(k) (solvent used to salvage Sidewinder casing placed into the burn pit). Because solvents

used to clean explosives residues become highly unstable, Goodrich was required to incinerate any such mixture as an explosive. Indeed, subsequent government manuals explicitly recognized that solvents used in propellant cleaning activities needed to be discarded as an explosive. *See* Air Force Manual AFM 161-30, Solid Rockets/Propellants (Apr. 10, 1973), Ex. 102. The 1973 manual provides that:

> Waste [solvent], contaminated with propellant residue either in solution or suspension, is generated at mix stations, degreasers, mold cleaning stations, or any facility where propellant is cleaned from metal parts. Accident history has shown that spillage and evaporation of these residues can result in extremely sensitive material, more so than the parent propellant. . . . Destruction should be accomplished in the collection container, preferably a non-metallic one. . . . At the destruction site, the [non-metallic containers] are burned, pallet and all, by means of added waste propellant. Ignition of the propellant is accomplished by means of a black powder squib.

Id. at 7-3.3. Although the explicit requirement to treat contaminated solvent as an explosive did not appear until 1973, it is clear from this manual that Goodrich's decision to burn any solvent used in the production process to clean equipment containing propellant or ammonium perchlorate was correct and in full compliance with then-applicable military manuals. Once the solvent was contaminated with perchlorate or propellant residue, it took on the characteristics of the propellant. Goodrich therefore was required to dispose of it accordingly – by burning it on bare ground.

B. Goodrich Was Complying With Valid Legal Regulations Created Pursuant to Federal Law: Conflicting State Laws Are Preempted

As discussed above, Section XIV(B), *supra*, the Board's authority to determine liability for groundwater contamination is based primarily upon California Water Code Section 13304(a), which the Draft CAO cites as its primary basis for jurisdiction. *See* Draft CAO at 1-2. As discussed above, even if Water Code Section 13304(a) is erroneously applied, since the Goodrich activities in question occurred prior to the law's enactment, the Advocacy Team must prove a violation of preexisting state law requirements, which were in effect at the time, for Goodrich to be found responsible for

the alleged discharges.[148] Goodrich, though, cannot be found to be in violation of any existing law or regulation during its operation of Rialto because it was in full compliance with applicable technical manuals and requirements issued by the U.S. military that directed it to undertake the very activities about which the Advocacy Team is complaining.

1. The Military Has Statutory Authority to Promulgate Regulations Applicable to Its Procurement Activities

In 1831, the Supreme Court confirmed that the federal government has inherent power to contract. *See United States v. Tingey*, 30 U.S. 115 (1831). The head of the Department of Defense, as an executive department of the United States, and the separate heads of the Department of the Army, the Department of the Navy, and the Department of the Air Force, have been granted plenary authority by Congress to prescribe regulations governing the conduct of their various organizations, including the power to contract for goods and services. *See* 5 U.S.C. § 301 (2000) ("The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business . . . ."). The Secretary of Defense also has been provided broad authority by Congress to "prescribe regulations governing the performance within the Department of Defense of the procurement, production, warehousing, and supply distribution functions, and related functions, of the Department of Defense." 10 U.S.C. § 2202 (2000). Congress also provided the heads of the various military departments with the power to issue regulations to regulate their various functions, including procurement. *See Id.* § 3013(g) (providing that "[t]he Secretary of the Army . . . may prescribe regulations to carry out his functions, powers, and duties under this title"); *see also Id.* § 6011 (Navy); *Id.* § 8013(g) (Air Force). Faced with a host of methods of

[148] *See,* Section XIV; Calif. Water Code § 13304(j) (stating that the "section does not impose any new liability for acts occurring before [its passage], if the acts were not in violation of *existing* laws or regulations at the time they occurred") (emphasis added).

contracting throughout the Department of Defense following World War II, Congress passed the Armed Services Procurement Act of 1947, 62 Stat. 21, 10 U.S.C. §§ 2301 *et seq.*, to standardize the military procurement process. Under this Act, the Department of Defense was instructed to promulgate the Armed Services Procurement Regulations ("ASPR"), which were intended to "establish for the Department of Defense uniform policies and procedures relating to the procurement of supplies and services. . ." 32 C.F.R. § 1.101 (1963).[149]

Under the authority granted by these laws and regulations, the various military departments are empowered to promulgate specifications, technical manuals, orders, and directives to govern how they conduct business, including the power to impose these requirements upon their government contractors. The Supreme Court has confirmed that these military department regulations "have the force of law." *See Pub. Util. Comm'n of Cal. v. United States*, 355 U.S. 534, 542-43 (1958) (citing to the general statutory power to issue regulations and finding that various military manuals, guides, and regulations trumped California's right to impose any restraint or control on federal transportation procurements).

2. Under the Supremacy Clause, Conflicting California Laws and Regulations Are Preempted by Valid Federal Regulations Governing the Operation of the Burn Pit

Even if the California state laws and regulations that were in place from 1957 through 1964 are found applicable to Goodrich's operation of its burn pit – again, a conclusion that Goodrich disputes – Goodrich cannot be found to be in violation of these

[149] The ASPR was designed to be modified on a regular basis as contracting practices were identified requiring uniform application across the military departments. *See* 32 C.F.R. § 1.106(b) (1963). In 1968, the ASPR was revised to include a provision that required the insertion of a specific clause in all military contracts that mandated compliance with the newly promulgated "DOD Contractor's Safety Manual for Ammunition, Explosives and Related Dangerous Material." 32 C.F.R. § 7.104-79(a) (1968). The DoD Contractor's Safety Manual, Ex. 91, was drafted by the Department of Defense to combine all requirements and standards regarding explosive handling that had been previously found in numerous technical orders and manuals issued by the various military departments into a single document that would be imposed upon every government contractor. *See Id.* §§ 100, 106.

state obligations because it complied with valid and contrary federal specifications that carry the force of federal law. Based on the Supremacy Clause, U.S. CONST. Art. VI, cl. 2, the Supreme Court has held that in the face of any conflict between federal law and state law, federal law prevails under the principle of "congressional pre-emption." *See North Dakota v. United States*, 495 U.S. 423, 435 (1990).

In *Public Utilities Commission of California*, the Supreme Court invalidated California's state policy regulating negotiated rates because it conflicted with federal government procurement regulations that also governed the use of negotiated rates. 355 U.S. 534. The government regulations at issue were found in military manuals and regulations similar to the disposal manuals here. *See Id.* at 542. The Court explained that:

> [t]he conflict is as plain as it was in *Arizona v. California*, 283 U.S. 423, 451, where a State sought authority over plans and specifications for a federal dam, in *Leslie Miller, Inc. v. Arkansas, supra*, where state standards regulating contractors conflicted with federal standards for those contractors, and in *Johnson v. Maryland*, 254 U.S. 51, where a State sought to exact a license requirement from a federal employee driving a mail truck. The conflict seems to us to be as clear as any that the Supremacy Clause, Art. VI, cl. 2, of the Constitution was designed to resolve.

Id. at 544.

In *Leslie Miller, Inc. v. Arkansas*, for example, the Court considered whether a state regulation that required a state license to do business conflicted with the ASPR regulation that governed which contractors were sufficiently "responsible" to bid on federal contracts. 352 U.S. 187, 188 (1956). The Court invalidated the state regulation because "[m]ere enumeration of the similar grounds for licensing under the state statute and for finding 'responsibility' under the federal statute and regulations is sufficient to indicate conflict between this license requirement which Arkansas places on a federal contractor and the action which Congress and the Department of Defense have taken to insure the reliability of persons and companies contracting with the Federal Government." *Id.* at 189-90. Citing *Johnson v. Maryland*, the Court concluded that the imposition of additional requirements by the state:

> does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to *those that the Government has pronounced sufficient.* It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed . . . .

Id. at 190 (quoting *Johnson*, 254 U.S. 51, 57 (1920)) (emphasis added).

Here, the conflict is as clear as it was in *Leslie Miller* and the other cases cited above. The federal government promulgated regulations governing the disposal of explosives that the military considered sufficient. The Board is now attempting to impose additional state law requirements by holding Goodrich in violation of state law for compliance with these very regulations. The Supremacy Clause, and the Supreme Court's application of that clause's principles to cases like Goodrich's, require the state to yield to the federal government's regulations regarding the burn pit at the Rialto site.

3. California Civil Code Section 1714.6 Prohibits Enforcement Against Goodrich

In fact, California law recognizes this basic principle of federal preemption by expressly granting immunity from state statutes for persons who are obeying military orders:

> [n]o person shall be prosecuted for a violation of any statute or ordinance when violation of such statute or ordinance is required in order to comply with an order or proclamation of any military commander who is authorized to issue such orders or proclamations; nor shall any person be prosecuted for a violation of any statute or ordinance when violation of such statute or ordinance is required in order to comply with any regulation, directive, or order of the Governor promulgated under the California Emergency Services Act. The provisions of this section shall apply to such acts or omissions whether occurring prior to or after the effective date of this section

Calif. Civil Code § 1714.6 (2007).

Accordingly, under this California statute, no person can be held liable under any statute or ordinance when it is merely following authorized military orders. As discussed above, Goodrich's use of a burn pit at Rialto was mandated by numerous military

ordnance manuals and technical orders that were issued pursuant to federal law by military commanders authorized to publish such regulations. These valid regulations directed Goodrich to dispose of explosive wastes – such as scrap ammonium perchlorate – by incineration in a burn pit. The State Board therefore cannot prosecute Goodrich for these very same disposal practices, nor find Goodrich in violation of any applicable statute or ordinance that conflicts with Goodrich's obligation to obey such orders.

C. The Government Contractor Defense Operates to Shield Goodrich from Liability Under Competing State Law Requirements

In a similar application of federal supremacy, the potential conflict here between state law and federal contract specifications demands the invocation of the government contractor defense, which operates to extend the government's own sovereign immunity to private contractors who operate at the behest of the government. The defense requires a contractor to prove that: 1) the government approved reasonably precise specifications; 2) the product or services conformed to the specifications; and, 3) the contractor warned the United States about the dangers that were known to the contractor but not known to the government. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988). Goodrich is entitled to dismissal of the Draft CAO because the undisputed facts show: 1) that Goodrich was subject to various government regulations and specifications that governed its use and disposal of ammonium perchlorate and contaminated solvents at its Rialto facility; 2) that it followed these specifications; and, 3) that neither Goodrich nor the government knew that the use or disposal of ammonium perchlorate or solvents containing explosive materials could potentially result in the alleged groundwater contamination that lies at the heart of the Advocacy Team's allegations.

1. The Government Contractor Defense Applies Whenever a Conflict Exists Between Federal Law and State Law With Regard to a Government Contractor's Activities

Although the defense generally has been applied in product liability and

procurement cases, it is applicable in all government contract situations involving a significant conflict between an identifiable federal policy and the operation of state law. Such a conflict exists when, as here, the federal government exercised its discretion and imposed requirements on a contractor, the contractor acted pursuant to that discretion, and state law conflicted with the federal policy.

In *Boyle*, the Supreme Court first explained that there are certain areas of law that involve "uniquely federal interests." *Id.* at 504-05. It concluded that "the imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected." *Id.* at 507; *Id.* at 511 (noting that military procurement "often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness"). The Court, however, felt that extending sovereign immunity to government contractors *in every situation* was unwarranted. *Id.* at 510.[150] It decided instead that pre-emption of state law would be permitted only in circumstances in which a "significant conflict exists between an identifiable federal policy or interest and the operation of state law." *Id.* at 507 (internal quotations omitted).

In trying to determine when a conflict would be sufficiently "significant" to justify

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[150] The United States has not waived its sovereign immunity with respect to state laws that would subject it to liability for investigation and clean up of past contamination at sites that it no longer owns. The waiver of sovereign immunity in the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9620(a)(4), waives immunity with respect to state law only for facilities currently owned or operated by the United States. "[T]he CERCLA waiver of sovereign immunity does not allow state law claims against the government for liability based on past ownership or operation of facilities involved in releasing or depositing hazardous wastes." *Gen. Motors Corp. v. Hirschfield Steel Serv. Ctr.*, 402 F. Supp. 2d 800, 804 (E.D. Mich. 2005). Similarly, the limited waiver of sovereign immunity in the Resources Conservation and Recovery Act, 42 U.S.C. § 6961(a), does not subject the United States to actions that "seek contribution for the costs of responding to past pollution at sites that are not currently owned or operated by a federal agency." *Id.* at 807 (reasoning that "[i]t would be unusual indeed for Congress to embed a waiver of governmental immunity for a species of damages in legislation that does not even allow those same damages as a remedy against non-governmental defendants").

extending preemption to contractors, the Court adopted the discretionary function exemption from the Federal Tort Claims Act ("FTCA"). *Id.* at 510. The Court emphasized that while Congress had waived sovereign immunity for the wrongful behavior of Government employees, it had exempted from this waiver claims involving the performance of a discretionary function. *Id.* In borrowing from the FTCA, the Supreme Court was not limiting the application of the government contractor defense to particular claims. It was, instead, highlighting the importance that Congress ascribes to federal discretion in any context. And it was using the notion of the discretionary function as a limiting principle "to ensure that the defense would not interfere unduly with the operation of state law." *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1333-34 (11th Cir. 2003). Therefore, because Congress places such a high value on federal discretion, government contractors who act according to federal discretion should share in the federal immunity available to government agents. *See Boyle*, 487 U.S. at 511; *Hudgens*, 328 F.3d at 1334. To hold otherwise would diminish the value of federal discretion and would create a significant conflict between the will of the federal government and the will of the state.

The government contractor defense "protects a government contractor from liability for acts done by him while complying with government specifications during execution of performance of a contract with the United States." *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 448 (9th Cir. 1983).[151] Courts have explained that the availability

[151] California courts follow the government contractor defense as set forth in *Boyle*. *See Jackson v. Deft, Inc.*, 223 Cal. App. 3d 1305, 1313-1319 (Cal. Ct. App. 1990). The Ninth Circuit has characterized the government contractor defense as the "military contractor defense," so termed because the Ninth Circuit has interpreted *Boyle* as applying exclusively to military contractors. *See In re Haw. Fed. Asbestos Cases*, 960 F.2d 806, 810-11 (9th Cir. 1992). The circuits are split on whether the government contractor defense applies to military as well as non-military contractors, although the prevailing view is that *Boyle's* rationale extends to non-military contractors as well. *See, e.g., Carley v. Wheeled Coach*, 991 F.2d 1117, 1119-23 (3d Cir. 1993); *Yeroshefsky v. Unisys Corp.*, 962 F. Supp. 710, 715-17 (D. Md. 1997). The State of California appears to have implicitly adopted the Ninth Circuit's "military contractor defense." *Jackson*, 223 Cal. App. 3d 1305. *But see* 6 Witkin, Torts § 1313A (Supp. 2002) (adopting the "government contractor defense"). The denomination of the defense is not an issue here, however, since Goodrich was clearly a military contractor at its Rialto facility.

of the government contractor defense "cannot be determined by the label attached to the claim. Strict adherence to the three *Boyle* conditions specifically tailored for the purpose will ensure that the defense is limited to appropriate claims." *Snell v. Bell Helicopter Textron*, Inc., 107 F.3d 744, 749 (9th Cir. 1997) (quotations omitted) (holding that the government contractor defense can apply to a manufacturing defect). "[T]he question is" not whether the defense is asserted against a claim with a particular label but "whether subjecting a contractor to liability under state tort law would create a significant conflict with a unique federal interest." *Hudgens*, 328 F.3d at 1334 (applying the defense to a military maintenance contract because the *Boyle* analysis was not designed to create all-or-nothing rules regarding the type of contract to which the government contractor defense might apply); *see also McMahon v. Presidential Airways*, 410 F. Supp. 2d 1189, 1197-98 (M.D. Fla. 2006) (holding that the defendant had a colorable federal defense when it claimed the government contractor defense for its transportation of servicemen and ammunition).

The factors articulated by the Court in *Boyle* ensure that such a conflict with state law exists by requiring that federal discretion was employed and followed. The first two prongs ensure that "the suit is within the area where the policy of the discretionary function would be frustrated." *Boyle*, 48 U.S. at 512. The last prong is necessary to eliminate any incentive the contractor might have to withhold from the government information regarding risks. *Id.* at 512-13. Although the prongs in *Boyle* were created in terms applicable to a products liability case, they are equally applicable to the conflict created here by the Advocacy Team's attempt to impose liability on Goodrich for its operation of the burn pit at Rialto.

2. The Government Contractor Defense Protects Contractors When Hazardous Materials Are Released as the Result of the Federal Government's Discretionary Decisions

The government contractor defense specifically applies in circumstances of environmental contamination. In *Miller v. Diamond Shamrock Co.*, 275 F.3d 414 (5th Cir. 2001), the appeals court affirmed summary judgment based on the government

contractor defense in a large tort action brought by civilian employees against seven chemical companies involved in the manufacture of Agent Orange during the Vietnam War. The chemical companies were not liable for claims based on exposure to dioxin in Agent Orange because dioxin was specified by the government as a necessary component of the final product, just as the proper disposal of ammonium perchlorate and solvents contaminated with explosives were specified as necessary here. *Id.* at 419-21.

The government contractor defense unquestionably applies when, as here, the military directs and controls the exact methods of disposal. Federal courts have dismissed similar claims by third parties directly against the United States, finding that military decisions regarding waste disposal involve an element of judgment or choice, and, therefore, are subject to the discretionary function exception to the FTCA. *See, e.g., OSI, Inc. v. United States*, 285 F.3d 947, 953 (11th Cir. 2002) (finding that the Air Force was immune from suit for soil and groundwater contamination caused by landfills both on and near Maxwell Air Force Base and holding that disposal of waste on a military base "involves policy choices of the most basic kind . . . [and] requires that [the military] be free to weigh environmental policies against security and military concerns") (internal quotations omitted); *Aragon v. United States*, 146 F.3d 819, 826 (10th Cir. 1998) (finding that the Air Force's decisions with respect to the treatment of solvent waste water were "operational decisions . . . subject to defense and security considerations" that fell within the discretionary function exception). *Boyle* requires the same outcome when the military has directed the manner in which a government contractor must dispose of certain wastes, because "it makes little sense" to protect the government against financial liability for waste disposal decisions when the government performs the disposal itself but not when it contracts for that disposal with private parties. *Boyle*, 487 U.S. at 512.

The United States District Court for the Central District of California has in fact addressed the applicability of the government contactor defense to waste disposal in the context of a removal proceeding. *See Arness v. Boeing N. Am., Inc.*, 997 F. Supp. 1268,

1274 (C.D. Cal. 1998). In *Arness*, plaintiffs sued defendant Boeing based on the alleged release of trichloroethylene, and Boeing sought to remove the case to federal court. The court found that Boeing *had alleged a colorable federal defense under Boyle* because "the government's requirement that [Boeing] use TCE *could* invoke the government's need to exercise its discretion regarding the military equipment tested by [Boeing] for the government." *Id.* at 1272 (emphasis added). The court concluded, however, that Boeing was not entitled to removal because "none of the specifications proffered by [Boeing] require [Boeing] to dispose of TCE in a particular manner, which disposal is at the center of Plaintiffs' Complaint." *Id.* at 1274. The motion was therefore denied only because the defendant failed to show, based upon the facts before the court, that the government directed the method of disposal for the solvent in question. *See also N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp.*, 381 F. Supp. 2d 398, 404 (D.N.J. 2005) (finding that defendants had raised a "colorable federal defense" in asserting the government contractor defense in a suit brought by the State of New Jersey alleging violations of the New Jersey Spill Act).

The element that was missing in *Arness* – government direction – is certainly present in *this* case with respect to ammonium perchlorate, making the defense fully applicable to this highly-regulated material that was vital to the United States' Cold War efforts. As discussed above, the government imposed detailed requirements that directed Goodrich to incinerate ammonium perchlorate in a burn pit. Moreover, there is ample evidence that these military specifications required Goodrich to burn any solvents *contaminated* with explosives like ammonium perchlorate. Goodrich has demonstrated that it complied with the government-issued regulations – which governed disposal of the ammonium perchlorate at Rialto – and the Draft CAO contains no evidence to the contrary.[152] Accordingly, the government contractor defense applies to the facts before

[152] The third prong of the government contractor defense, that the contractor "warned the United States about the dangers in the use of the [product] that were *known* to the [contractor] but not to the United States," *Boyle*, 487 U.S. at 512 (emphasis added), is also met here because the government supplied the specifications directing disposal. Moreover, as the Fifth Circuit found in *Miller*, there was no duty to inform the government

the Board.

Further, the Advocacy Team cannot defeat the defense by arguing that additional precautions at the burn pit should have been taken beyond those required by the government. *See Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940) (holding that a claim by landowners for water damage caused by a private contractor while widening the Missouri River for the United States Government was barred because "there is no liability on the part of the contractor for executing [the government's] will"). The principle announced in *Yearsley* was applied in *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824 (D. Conn. 1965), where a Navy contractor hired to dredge and improve a river was sued by a neighboring landowner for property damage allegedly caused by fumes that escaped as a result of the dredging. The decision to deposit the dredging in the vicinity of the plaintiff's property was made by the government based on time constraints and "the high priority given to the project by the Secretary of the Navy." *Id.* at 826. The court granted summary judgment for the contractor, holding that

> [t]he question of foreseeability of harm and the possible need to protect against it arose when the Government framed its terms. There is no charge that what the contractor did was not what it was required to do. Rather, it is that it was negligent in failing to provide some safeguard against the subsequent escape of the fumes. Yet, as stated above, this was a decision which rested with the Government. The Government did not provide for such additional precautions in the plans, and [the contractor] is not to be held liable for this omission.

Id. at 827 (citations omitted).

Goodrich thus cannot be liable for the performance of its contracts at the Rialto

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of the potential hazards of AP because of "the paucity of scientific evidence" that it "was in fact hazardous." 275 F.3d at 421. Neither party in this case was aware that the disposal practices at Rialto could lead to the groundwater contamination at issue today. As with the dioxin in Agent Orange, and perhaps more so, no party knew during the time of Goodrich's operations at Rialto that AP was a groundwater contaminant of concern. *See* Holub Dep. 16:23-17:8 (testifying that nobody suspected that perchlorate had contaminated the groundwater until 1997) and 685:8-14 (stating that there was no requirement under state law in 1987 to test for perchlorate). *See also* Thibeault Dep. 482:16-483:17 (testifying that perchlorate was not a pollutant of concern in 1987). To the extent that there were known risks surrounding AP, the government's knowledge of these risks was equal to, if not greater than, Goodrich's knowledge.

facility. It was merely complying with government-imposed directives, which reflected the government's own balancing of various factors such as safety, national security, and cost to the taxpayer. Under the reasoning of *Yearsley* and *Dolphin Gardens*, Goodrich is further shielded by the government's sovereign immunity against any claim by Plaintiffs that it should have done more than what was required by the government to prevent the contamination. *See OSI, Inc.*, 285 F.3d at 947 (finding the government immune from liability because chemical waste disposal "involves policy choices of the most basic kind"). Accordingly, unless the Board receives supportable evidence that the ammonium perchlorate contamination occurred because Goodrich failed to comply with government specifications, it should dismiss the Advocacy Team's claims.

The undisputed evidence in this case demonstrates that the federal government validly promulgated specific directions for Goodrich's use, handling, and disposal of ammonium perchlorate and any solvent contaminated with ammonium perchlorate or propellant at the Rialto site and that Goodrich followed those directions to the letter in its role as a government contractor. Both the Supremacy Clause, which dictates that federal regulations trump conflicting state laws in cases such as this, and the government contractor defense, which has shielded contractors in cases where – as here – the three *Boyle* factors were satisfied, preclude the Board from imposing liability upon Goodrich for cleanup of the Rialto site. Goodrich is therefore entitled to a dismissal of all allegations levied by the Advocacy Team relating to the releases alleged in the Draft CAO.

XVI. OTHER POTENTIALLY LIABLE PARTIES WERE NOT NAMED IN THE CAO AND HAVE BEEN BLATANTLY IGNORED

The only alleged dischargers named in the CAO by the Advocacy Team, and joined in by their co-prosecutor, the City of Rialto, are Goodrich, the Emhart parties, and Pyro Spectaculars. But this, at best, is a gross error of prosecutorial discretion, and, at worst, a clear demonstration of prosecutorial bias and conflict of interest combined with a "rush to judgment." As discussed above, a wealth of evidence overwhelmingly

demonstrates that Pyrotronics Corporation (aka "Apollo Manufacturing"), and Ken Thompson are responsible for the confirmed discharge of perchlorate to the groundwater. The record also demonstrates that the State of California, through the Regional Board, the City of Rialto, through its planning and fire departments, and the County of San Bernardino, through the operation and expansion of its Mid-Valley Landfill, bear culpability for the perchlorate contamination in Rialto that is the subject of the instant proceedings.

Given Water Code Section 13304(a) specifically contemplates that governmental entities can be liable "persons" and the credible evidence of their culpability, these parties cannot be ignored in these proceedings. The fact that they have been makes clear that the Advocacy Team and the City have deliberately abused this process to blame others for the perchlorate contamination that clearly has resulted from their own acts and omissions.

A. Pyrotronics' Operations Cannot be Overlooked

Amazingly, the Advocacy Staff inexplicably leaves out Pyrotronics Corporation and its two decades of operations from this matter -- even though evidence against Goodrich amounts to nothing when compared to that against Pyrotronics. The Advocacy Staff does not dispute that Pyrotronic's operations resulted in the only confirmed perchlorate discharge on the 160-acre parcel.

As detailed above, Pyrotronics handled significant quantities of raw perchlorate as part of its manufacturing operations. Floor sweepings, which contained perchlorate, were collected from the mixing and press rooms and transported for disposal to the Fireworks Burn Pit located on Pyrotronics' property. Damaged or defective fireworks and other production waste were also disposed of in the burn pit and later on a concrete pad where burns were also conducted at the facility. The mixing and press rooms were hosed down with water at the end of each day, and the wash water flowed into sumps outside the rooms and occasionally overflowed onto the bare ground.

Notably, Pyrotronics also built the McLaughlin Pit at the direction and with the

approval of various public agencies including the Regional Board, which it operated for nearly sixteen years and used to dispose of the floor sweepings mentioned above and damaged or defective fireworks. The McLaughlin Pit was intentionally flooded with thousands of gallons of water on a regular basis in order to prevent the perchlorate and other chemicals in the pit from auto-igniting. Pyrotronics routinely and repeatedly violated the WDRs governing the operation of the McLaughlin Pit – failing to prepare monitoring reports or adhere to the freeboard requirements – and overflows onto the bare ground were reported by witnesses including Mr. Berchtold. In addition to overflows, perchlorate-laced water penetrated the exterior gunite of the pool and escaped into the surrounding soil materials due to a combination of factors that diminished the integrity of the plaster membrane that coated the gunite reservoir of the pit.[153] English Dec. ¶¶ 37-54. Almost completely absent from the record is documentation of where liquid waste from the McLaughlin Pit was transported for ultimate disposal leaving open the possibility that it was merely dumped on the property.

Pyrotronics' display fireworks division, California Fireworks Display Company, routinely tested aerial fireworks on the property, resulting in duds, "stars", and other debris specifically containing perchlorate falling back down to the bare ground at the facility. Pyrotronics' sloppy operations also led to numerous fires and explosions (some involving fatalities and serious injuries), including major explosions in mixing and press rooms where fireworks composition was handled, causing still further perchlorate releases across large portions of the property.

Based on these and other well-documented releases caused by Pyrotronics over its twenty years as an owner/operator on the 160-acre parcel, Pyrotronics cannot be taken out of the equation in these proceedings. The fact that Pyrotronics declared

[153] These factors included exposure to high temperatures, the lack of fluid contact at certain points in time, the chemical composition of the material disposed in the pool, lack of filtration or circulation within the pool structure, hydrostatic pressure changes, earth or ground movements and/or contacts with solid objects and the level of abrasion and/or degradation from such objects. English Dec. ¶¶ 18-25, 37-54.

bankruptcy provides no excuse for the Regional Board. The Regional Board had knowledge of Pyrotronics' bankruptcy filing by at least July 1986, well before the "closure" of the McLaughlin Pit, yet simply chose not to make a claim in bankruptcy against Pyrotronics. Goodrich Ex. 10376; Berchtold Dep., 233:17-234:22; 234:24-235:2; 235:4-237:3; 250:14-19. The Regional Board has made no effort to determine if Pyrotronics Corporation can respond to the Section 13304 order, nor if any of its successors, like APE or Ken Thompson, are now legally responsible for Pyrotronics' liabilities.

B. Ken Thompson is Liable For Groundwater Contamination Because He Accepted Responsibility to Close the McLaughlin Pit; Improperly Closed the Pit; and Still Owns the Pit Today

As explained above, Ken Thompson purchased the southern portion of the 160-acre parcel (where the McLaughlin Pit was located and before it was closed) from Pyrotronics in May 1987 for use in a concrete pipe manufacturing business. He has owned that property, and the McLaughlin Pit site, ever since. As a condition of the property sale, Mr. Thompson agreed to fully close the McLaughlin Pit and perform any necessary, related cleanup and to release Pyrotronics from any liability for the McLaughlin Pit and its closure. Ex. 11116, 11215. Mr. Thompson hired Mr. McLaughlin to close the pit, although Mr. McLaughlin was neither a registered civil engineer or a certified engineering geologist, and despite the fact that Subchapter 15 required an individual with such credentials to supervise the McLaughlin Pit's closure. *See* Adelson Dep., 111:2-112:20 (This requirement was to be satisfied by the discharger; the Regional Board did not provide somebody with the requisite credentials from the Regional Board signing off on the closure). And as detailed extensively above, Mr. McLaughlin's plan to burn the approximately 54,000 pounds of waste material that remained in the McLaughlin Pit was carried out without necessary public agency approval, and the pit's "closure" was in plain violation of Subchapter 15's detailed requirements (including monitoring for perchlorate), which were just ignored. Further, Mr. Thompson also failed to submit a report to the City Engineer certifying that the McLaughlin Pit had been

cleaned up in a satisfactory manner with the approvals of all necessary public agencies – as he was required to do under the mitigated negative declaration adopted by the City pursuant to CEQA that allowed him to develop the land.

As such, Mr. Thompson is directly responsible for the perchlorate discharges emanating from the McLaughlin Pit and should be named in the CAO. Cal. Wat. Code § 13304(a). It is simply inexplicable (and inexcusable) that the person who agreed to close the McLaughlin Pit and clean-up any releases (and released and indemnified Pyrotronics Corporation from any such liability) has never been required to do any investigation in Rialto and is mysteriously missing from these proceedings. Indeed, the Regional Board's inexplicable decision to stop the enforcement of its Section 13267 order issued to Mr. Thompson in 2004 leaves no doubt about the inequitable treatment that Mr. Thompson, the owner of the McLaughlin Pit, has been given when compared to the alleged "dischargers" whom the Regional Board has chosen to prosecute here.

Mr. Thompson is also a liable person under Section 13304(a) because he is the current owner of the property where the McLaughlin Pit (the only confirmed source of perchlorate releases from the 160-acre parcel) is located. *See Harvey Spitzer, et al.*, Order No. WQ 89-8. Likewise, as "[t]he owner of the property [of a nonoperating industrial or business location] on which the condition exists, or is created," Mr. Thompson is liable. Water Code 13305(f). Therefore, Mr. Thompson "must share in the responsibility for the cleanup" with the State and the City of Rialto. *Zoecon Corporation*, Order No. WQ 86-2 (SWRCB 1986)[154] (emphasis added).

The Regional Board's failure to pursue and excusal from its directive of Mr. Thompson is highly unusual and contrary to precedent, as the owner of the property subject to a cleanup order is typically named under "[a] long line of State Board orders [that] have upheld Regional Board orders holding landowners responsible for cleanup of

[154] ". . . the petitioner characterizes itself as the 'mere landowner' in this situation. Yet it is this very role that puts [the landowner] in the position of being well suited to carrying out the needed onsite cleanup. The petitioner has exclusive control over access to the property. As such, it must share in responsibility for the cleanup."

pollution on their property regardless of their involvement in the activities that caused the pollution." *Spitzer; see also, Zoecon.* Here, of course, the case for naming Mr. Thompson is all the more compelling because he bears direct responsibility for the inadequate closure of the McLaughlin Pit and the ensuing contamination.

C. The State of California Is Responsible For The Contamination Generated By Pyrotronics

1. The Regional Board "Permitted" Discharges to Occur from the McLaughlin Pit and Robertson Ready Mix Under Water Code Section 13304(a)

Under Water Code Section 13304(a), any "person," can be held liable if the conditions of the statute are met. Because it is undefined in the statute, the word "permit" is given its ordinary dictionary meaning, and "to permit" is defined to mean "to . . . allow, consent, let; to give leave or license; to acquiesce, by failure to prevent, or to expressly assent or agree to the doing of an act." *Black's Law Dictionary*, p. 1298, col. 1 (Rev. 4th ed. 1968). The definition of "person" "includes any *city*, county, district, the *state*, and the United States, to the extent authorized by federal law." Water Code Section 13050(c). (emphasis added.)

Here, the facts establish that the Regional Board's staff (including key members of the Advocacy Team here), and by extension the State, allowed, consented to, acquiesced in, failed to prevent and expressly assented and agreed to: (1) the operation of the McLaughlin Pit in violation of its WDRs for over sixteen years, and, after 1984, operation and closure of the Pit without any serious effort to compel compliance with the Subchapter 15 requirements for waste disposal units, and (2) the installation of four unlined settling ponds directly over areas of known perchlorate storage and use without any soil investigation for perchlorate, causing significant amounts of perchlorate to discharge to the groundwater. The State is thus a liable person under Water Code Section 13304(a) and should be ordered to investigate and cleanup the contamination it permitted to be discharged from the McLaughlin Pit. Had the Regional Board carried out its Subchapter 15 obligations, the perchlorate contamination caused by the McLaughlin

Pit would have been detected in 1987 and remediation efforts initiated immediately until completion. Instead, the McLaughlin Pit discharge has continued unabated for some twenty years after its botched closure, and remains unaddressed today.

Further, had the Regional Board properly executed its mandatory duties, it would have protected the State in the Pyrotronics bankruptcy proceeding and obtained a standard preference for environmental compliance obligations of the debtor with the preference allocation of Pyrotronics' assets toward the obligations imposed under Subchapter 15, including the monitoring and leak detection requirements, closure, post-closure, corrective action requirements and financial assurances.

Finally, the Regional Board's issuance of the Water Code Section 13267 letter to Mr. Ken Thompson in 2004 to investigate the perchlorate contamination emanating from the improperly closed McLaughlin Pit, and their inexplicable failure to require Mr. Thompson to do anything other than cooperate in providing access to his property so that other parties, also compelled by the Regional Board, could bear the burden of the investigation of the Pit that Mr. Thompson had taken responsibility for, makes clear that the Advocacy Team here is biased and is attempting to deflect attention away from their own responsibility for failing to properly address the McLaughlin Pit.

2. The Regional Board is Liable Under Government Code Section 815.6 as it Failed to Discharge its Subchapter 15 Duties

Government Code Section 815.6 provides:

> Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes reasonable diligence to discharge the duty.

(emphasis added). For purposes of Government Code Section 815.6, an "enactment" includes regulations like Subchapter 15. *See* Gov. Code § 810.6 ("'enactment' means a constitutional provision, statute, charter provision, ordinance or regulation."). A public entity is under a "mandatory duty" for purposes of Section 815.6 if it is obligated to take a particular action:

> [A]pplication of section 815.6 requires that the enactment at issue be obligatory, rather than merely discretionary or permissive, in its directions to the public entity; it must require, rather than merely authorize or permit, that a particular action be taken or not taken.

Walt Rankin & Assocs., Inc. v. City of Murietta, 84 Cal. App. 4th 605, 613 (2000). The language of an enactment is useful in determining whether or not it is mandatory: "the usual rule . . . is that 'shall' is mandatory and 'may' is permissive unless the context requires otherwise." *Id.* at 614.

From the time Subchapter 15 was adopted in 1984, and through the rescission of Apollo's WDRs for the McLaughlin Pit in 1991, Subchapter 15 imposed on the Regional Board a mandatory duty to enforce the operation and closure requirements of Subchapter 15 with respect to the McLaughlin Pit, a Class I hazardous waste unit:

> The regulations in this subchapter establish waste and site classifications and waste management requirements for water treatment, storage, disposal in landfills, surface impoundments, waste piles, and land treatment facilities. Requirements in this subchapter are minimum standards for proper management of each waste category.

23 Cal. Code Reg. § 2510(a) (emphasis added). In connection with the enforcement of these minimum standards, Subchapter 15 mandated that "[r]egional boards ***shall*** implement the regulations in this subchapter through the issuance of waste discharge requirements for waste management units." *Id.* at § 2510(f) (emphasis added).

Subchapter 15 further mandated that regional boards issue WDRs requiring all dischargers:

> to establish a detection monitoring program . . . designed to detect the presence of waste constituents in surface water or ground water outside of waste management units and in the unsaturated zone beneath and adjacent to a waste management unit . . ., [including] . . . [the] install[ation] [of] groundwater monitoring systems and unsaturated zone monitoring systems at the compliance points . . . [,and] . . . monitor ground and surface water for indicator parameters or waste constituents that provide a reliable indication of leakage from a waste management unit. The regional board shall specify in water discharge requirements the indicator parameters or waste constituents to be monitored after considering [three specific factors].

Id. at § 2556(a).

With regard to the "closure" of hazardous waste units, Title 23, California Code of Regulations Section 2510(d) mandated that the McLaughlin Pit "be closed and maintained after closure according to Article 8 of this subchapter." And Article 8 required compliance with "the monitoring program requirements in Article 5 of this subchapter, *throughout the closure and post-closure maintenance period.* The post-closure maintenance period shall extend as long as the wastes pose a threat to water quality." (Emphasis supplied.) In turn, Article 5 required that if a discharger found that a waste management unit had leaked then:

> For Class I waste management units, dischargers shall analyze samples from all monitoring points for all constituents identified in Appendix III of this subchapter. Such analyses shall be performed at least annually to determine whether additional hazardous waste constituents are present in ground water.

23 Cal. Code Reg. § 2557(e) (emphasis added).

Appendix III (Table B) in Subchapter 15 listed ***potassium perchlorate*** as one of the toxic chemicals for which monitoring was required if a leak was detected. In other words, the Regional Board had a duty to classify the McLaughlin Pit as a Class I hazardous waste impoundment and require Pyrotronics to monitor and detect any leaks from the McLaughlin Pit, which they failed to exercise. Further, had Pyrotronics implemented the proper detection monitoring program it would have found the massive leak in the pit that has been confirmed by recent sampling and Pyrotronics would have been required to sample for potassium perchlorate in the groundwater. All of this should have occurred between 1984 and 1986, long before Pyrotronics' bankruptcy had ever began and long before Ken Thompson had purchased the property, but for the failures of the Regional Board in exercising their mandatory duties.

Finally, Subchapter 15 also mandated that "regional board[s] shall require the discharger to establish an irrevocable closure fund or provide other means to ensure closure and post-closure maintenance of each classified waste management unit in accordance with an approved plan." *Id.* at § 2580(f).

The detailed factual record is clear that the Regional Board never required Pyrotronics or Ken Thompson to comply with any of these mandatory closure requirements of Subchapter 15. Had these explicit regulatory obligations been implemented and enforced by the Regional Board, perchlorate contamination emanating from the McLaughlin Pit would have been detected in 1987 at the latest, and remediation could have gotten underway. But unfortunately, they were not. As such, the State of California is liable under Government Code Section 815.6 for the injuries to Rialto's groundwater proximately caused by the Regional Board's acts and omissions in connection with the McLaughlin Pit.

3. The Regional Board's Perchlorate "Investigation" Was Designed to Avoid Scrutiny of the Board's Own Misconduct

When the Regional Board staff began to investigate the perchlorate contamination in the Rialto/Colton Basin, its files were filled with information that Pyrotronics manufactured fireworks on the 160-acre parcel and disposed of massive quantities of perchlorate-laden waste into the McLaughlin Pit. Indeed, current Advocacy Team member Mr. Berchtold even inspected the McLaughlin Pit while it was operating, observed its overflow and reported other violations of its WDRs. Regional Board files also contained information leaving no doubt that the County's gravel washing operations incident to its Mid-Valley Landfill expansion released substantial quantities of perchlorate into the groundwater.

The Regional Board staff bears direct responsibility for these releases, because it failed to enforce the McLaughlin Pit's WDRs and disregarded its duty to enforce the Subchapter 15 regulations regarding monitoring and leak detection and closure of the pit. Regional Board staff also approved the use of unlined settling ponds by the County for soil washing operations. As such, it is simply inappropriate for a clearly culpable party such as the Regional Board through its staff to be responsible for prosecuting the perchlorate contamination investigation.

D. City of Rialto is a Responsible Party

1. The City Did Not Enforce a Mitigation Measure Requiring Proper Cleanup of the McLaughlin Pit

It is black-letter CEQA law that "[a]gencies adopting mitigated negative declarations must take affirmative steps to ensure that approved mitigation measures are in fact implemented subsequent to project approval." Remy, Thomas, Moose & Manley, Guide to the Cal. Env. Quality Act (10th Ed. 1999), at 247. This makes sense – mitigation measures that aren't enforced provide no mitigation at all. And an agency's obligation to enforce mitigation is a continuing one: "until mitigation measures have been completed the lead agency remains responsible for ensuring that implementation of the mitigation measures occurs . . ." 14 Cal. Code Reg. § 15097(a).

The mitigated negative declaration that was approved by the City and which allowed Mr. Thompson to redevelop Pyrotronics' former property included a very specific condition regarding the cleanup and closure of the McLaughlin Pit:

> Prior to any grading, construction or installation of equipment on Parcel 11, *the applicant shall have completed a satisfactory cleanup program of the fireworks residual pit on Parcel 11* and shall have certified the satisfactory completion of that program in a report to the City Engineer. *As part of that cleanup program, the applicant shall obtain all necessary permits or approvals from local, state and/or federal agencies as required.* (emphasis added.)

Ex. 11162.

Thus, it was absolutely clear that before Mr. Thompson could start to develop the property, indeed before he could even grade the site, he needed to submit a report to the City Engineer demonstrating that the McLaughlin Pit had been completely cleaned up in a satisfactory manner, and he needed to obtain all necessary public agency permits/approvals to carry out the cleanup. The record is devoid of evidence showing that he did either.

First, the City has not produced any written documentation that Mr. Thompson submitted any kind of a certification report to the City Engineer. Second, it is clear that Mr. Thompson did not obtain "all necessary permits or approvals from local, state and/or

federal agencies as required" to effectuate the cleanup. To the contrary, and as detailed above, the McLaughlin Pit was closed by Mr. Thompson's agents without any approval from the County, SCAQMD, USEPA, Regional Board, or DTSC. Mr. McLaughlin, who closed the pit on behalf of Mr. Thompson, testified that a December 15, 1987 letter from Mr. Van Stockum of the County qualified as the County's approval of his decision to burn the 54,000 pounds of perchlorate-containing waste that remained in the pit and to consider it closed. But Mr. Van Stockum testified clearly that this letter was not intended as the County's sign off on the burn and approval to proceed with development of the property, (Van Stockum Dep., 152:14-153:3), and Mr. Van Stockum was also very clear that the County did not have authority to authorize closure of a hazardous waste facility. Van Stockum Dep., 46:3-7; 85:13-86:15; 90:5-20; Roberts Dep., 48: 18-23; 109:2-21; 119:23-25; 120:1-11. Further, a December 3, 1987 letter (dated the day before the burn) from Mr. Van Stockum to State DTSC asked DTSC to respond to Mr. McLaughlin's closure plan because the County simply did not have the authority to approve it – further evidence that Mr. Van Stockum did not and could not approve Mr. McLaughlin's pit closure[155]. Goodrich Ex. 10141.

Had the City enforced the condition requiring Mr. Thompson to "obtain all necessary permits or approvals" for proper closure of the McLaughlin Pit prior to any grading, Mr. Thompson would have needed to receive approval that the pit was closed in compliance with the Subchapter 15 Regulations, as well as any associated approvals for the closure of the Class I hazardous waste site from U.S. EPA, California, and he would have had to obtain a permit from SCAQMD. As previously explained, had the Subchapter 15 requirements been followed, the perchlorate contamination caused by the McLaughlin Pit would have been detected in 1987, and remediation steps could have been undertaken. Instead, the City allowed Mr. Thompson to simply bury the pit and

[155] Further, the mitigation measure required that all necessary approvals be obtained *prior to grading*, but Mr. McLaughlin's purported satisfaction of this condition was a December 15, 1987 letter, while grading had begun in June or July of 1987.

build on top of it, leaving it unabated. Thus, through its failure to enforce the McLaughlin Pit-closure mitigation measure mandated by CEQA, the City has permitted the discharge of perchlorate in Rialto, and should be named in the CAO pursuant to Water Code Section 13304. For the same reason, the City is also liable under Government Code Section 815.6 for injuries to the Rialto groundwater because the City failed in its mandatory duty under CEQA to enforce the mitigation.

Given that the City's obligation to enforce its CEQA mitigation measure is ongoing, it is inconceivable that the City still hasn't directed Mr. Thompson to comply and cleanup the McLaughlin Pit after the perchlorate contamination was detected in 1997. Instead of doing so, and thereby obligating the responsible party to engage in clean up activities, the City has chosen to pursue an investigation of Goodrich and others and actually dismiss any claims against Thompson, even though it is undisputed that Goodrich had absolutely no involvement with the McLaughlin Pit release.

2. The City Was, and Is, Well Aware of the Perchlorate Usage at the Rialto Fireworks Facilities

The City of Rialto through its Fire Department was familiar with the facilities, inventory and operations of the Rialto fireworks companies going back to the 1960s because it regularly visited these facilities in the performance of its duties. The Rialto Fire Department was responsible for preparing "Pre-Fire Planning Inspections", in which it examined each facility and diagramed its buildings so that the Rialto Fire Department would be prepared in the event that it was called to respond to an emergency at that facility. McVeitty Dep., 60:10-61:1. During these inspections, the Rialto Fire Department also took note of each facility's hazardous materials inventory and recorded the manufacturing processes that the fireworks companies were involved with at the 160-acre site. The County eventually assumed jurisdiction over enforcement of hazardous materials statutes in the mid-1980s, and provided leadership and assistance with these duties to the City of Rialto Fire Department, but the City of Rialto Fire Department remained involved. See McVeitty Dep., 135:15-21; 306:5-21; 307:10-308:10; 265:22-

267:22.

In 1987, when the SCAQMD refused to allow the burning of fireworks waste material, the City of Rialto Fire Department knew that such waste was being stockpiled at dangerous levels but refused to record these violations because it was sympathetic to the fact that the fireworks companies had no means to dispose of their waste. Finally, the City of Rialto Fire Department sought to invoke AQMD Rule 444, which provided an exception to the AQMD burning restrictions in cases where there was a fire hazard to life and property. McVeitty Dep., 150:10-21; 151:4-22; 152:4-153:20; 154:11-23; 156:8-22; 238:15-239:15; 240:12-15; 240:19-241:6; Thrash Dep., 21:19-25:11; Ex. 11229.

The City of Rialto Fire Department also inspected locations where materials were to be burned, including the Fireworks Burn Pit and Burn Pipe, and City of Rialto Fire Department employees observed aerial fireworks tests in Rialto. Incident reports and other written records prepared by the City of Rialto Fire Department demonstrate that it has responded to fires and explosions at the various fireworks companies beginning in 1968 and continuing through the present, and that these fires have often involved powder and other fireworks materials. In addition, the City, through its police and fire departments, brought confiscated fireworks to the Pyrotronics facility to be burned in the Fireworks Burn Pit and the Burn Pipe.

XVII. CCAEJ AND ENVIRONMENT CALIFORNIA WILL NOT PROVIDE ANY ADDITIONAL INFORMATION RELEVANT TO THE PRESENT PROCEEDINGS

The Designated Parties, Center for Community Action and Environmental Justice (CCAEJ) and Environment California, have no relevant evidence to present in these proceedings. The purpose of the public hearing is to receive "relevant testimony and evidence" on four issues: "[1] legal responsibility for site investigation and remediation; [2] the technical evidence justifying site investigation and cleanup; [3] the feasibility and propriety of cleanup and remediation requirements; and [4] appropriate cleanup standards for protection of public health and beneficial uses of waters of the state." Ex. 20257 (Second Amended Notice of Public Hearing).

On February 13, 2007, Environment California and CCAEJ requested "joint Designated Party status in any meetings and hearings regarding how to proceed with cleanup of [the] Rialto Perchlorate Contamination." Ex. 20290. This request was summarily granted and they were listed as parties in the February 23, 2007 Notice of Public Hearing. Ex. 20257. As a result, they have been allocated a total of 5 and ½ hours time at the hearing – the same as Goodrich and each of the other parties accused of liability, and significantly more than the maximum time of three to five minutes allotted to other "interested persons" who wish to make "policy statements". Ex. 20400.

One would expect that Environment California and CCAEJ have been granted the status of parties in these proceedings because they have something material to say or present. However, that is not the case at all. As fully discussed below, the deposition testimony of representatives of Environment California and CCAEJ reveals that, with just a short time before submissions were due, they had not even figured out what subjects they intended to address, what witnesses will testify, or what evidence they will present. Underlying this disorganization is the plain fact that these organizations and their representatives have no firsthand or expert evidence to offer on any of the relevant subjects. Thus, it is appropriate that Environment California and CCAEJ's joint submission admits in the first two paragraphs that they will only present "policy arguments", unsupported by any witness or admissible evidence.[156] Accordingly, Goodrich fully expects that their presentation will not be permitted to address, in any way, the relevant evidentiary subjects of these proceedings. Such a presentation would amount to nothing more than baseless accusations and politicking, which will accomplish nothing other than wasting the time, resources, and energy of the proper parties and the State Board.

A. Environment California

Ms. Sujatha Jahagirdar appeared for deposition on March 26, 2007 as the

[156] The legal issues raised by Environment California and CCAEJ are addressed in the "Legal Arguments" section herein. See Section III, *supra*.

Federal Rule of Civil Procedure, Rule 30(b)(6) representative for Environment California on several subjects, including "any evidence" it intends to rely in these proceedings. Ex. 20060 (Topic 2).[157]

Environment California has not hired any consultants or experts to present any testimony on its behalf. Jahagirdar Dep., 55:16-19. It has not hired any experts at all. *Id.*, 68:13-14. It has not retained counsel to represent it at the hearing. *Id.*, 68:19-69:4. And it has not identified any potential witnesses, with one exception – Ms. Jahagirdar herself. *Id.*, 221:18-21.

Environment California intends to present testimony from Ms. Jahagirdar, who is "the point person on perchlorate at Environment California". *Id.*, 169:17-19, 227:3-4. As of her deposition, Ms. Jahagirdar did not even know what subject she will testify about.

> Q. You're going to testify. [¶] Are you preparing a declaration?
>
> A. We plan to – we haven't prepared it yet – for the August -- for the April 12th deadline.
>
> Q. And whose declaration is that going to be?
>
> A. Myself.
>
> Q. You're going to testify in a declaration. [¶] What are you going to say in your declaration?
>
> A. I don't know yet at all. I'm not a lawyer, and I'm very unfamiliar with the process, and I – I haven't even begun –
>
> * * *

[157] Federal Rule of Civil Procedure 30(b)(6) is the procedural vehicle for taking a deposition of a corporation or other entity, which is accomplished by deposing one or more representatives selected by the organization with knowledge of whatever topics are identified in the subpoena and/or deposition notice. Specifically, Rule 30(b)(6) provides: "A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization."

Q. Do you plan on submitting any type of expert testimony on any subject whatsoever?

A. Yes.

Q. What's your expertise –

A. Oh, me? Particular?

Q. Uh-huh.

A. Oh, I plan on submitting testimony.

Q. Yeah. I understand that. [¶] But are you going to submit any expert testimony?

A. I don't know. We haven't decided if I'm going to characterize myself as an expert or not.

Q. Well, what would you be an expert in that you could characterize yourself?

MR. MANN: Objection. Speculative.

A. I don't know. I haven't thought through it.

Id., 227:5-15, 227:25-228:15.

This indecision is likely explained by the fact that Ms. Jahagirdar does not possess firsthand knowledge or expertise concerning any relevant issue. Environment California neglected to include this important fact in its publications on the perchlorate contamination, and when it requested party status in these proceedings.

1. Ms. Jahagirdar has no relevant firsthand knowledge

Ms. Jahagirdar has no firsthand knowledge of the issues relevant to these proceedings.

Q. So are you aware of any allegations in this draft CAO which you've read that you have personal knowledge to?

A. No.

Q. Okay.

A. I've not seen, smelled, tasted or whatever.

Q. Or heard any of them?

A. Heard any of them.

Q. And to your knowledge, you're [not] getting up in this hearing and going to be sworn as a witness to testify personally as to any of the facts that are established –

A. Correct.

Q. That's very helpful. And we can put this aside, and that makes a lot of work that we would have to do otherwise, okay?

A. Okay.

Q. Now, let me ask you this: [¶] I understand the subject matters that you and Mr. Diaz are talking about presenting on, okay. [¶] But I want to know what documents at present do you intend to put into the record?

A. At present, we only plan to submit our – the materials that we submit on August 12th, so our kind of outline of our arguments and --

Q. You mean like a brief?

A. I don't know the legal term for it.

Q. Like a white paper?

A. I don't know what we're going to call it.

Q. Well, whatever you call it, you're going to write something?

A. We're going to present the out- -- as specifically as we need to, the arguments that we'll be presenting at the --

Q. But you haven't started writing that yet?

A. No.

Q. And to your knowledge, Mr. Diaz hasn't either?

A. To my knowledge, no.

Q. What about supporting documentation?

A. **We haven't thought through that at this point. [¶] But at this point, no intention of submitting anything that relates to firsthand knowledge of anything in the order.**

Id., 313:19-315:11 (emphasis added).[158]

[158] In addition, and while this is not a topic identified in the Notice of Public Hearing, Ms. Jahagirdar also testified she does not have any knowledge concerning "how citizens of Rialto are feeling about the perchlorate in their water", and therefore, she cannot present on that subject either. Jahagirdar Dep., 118:1-119:12.

In particular, Ms. Jahagirdar concedes that she has no factual basis for accusing Goodrich of responsibility for any perchlorate contamination, which stands in sharp contrast to her public accusations.

> Q. So you accuse Goodrich here of polluting the city's drinking water sources; right? [¶] Right?
>
> A. Yes.
>
> Q. But you don't know how they handled the waste at the site; right?
>
> A. Yes. [¶] Well, I mean, we know that we -- from what we read in depositions of the dumping of the unused perchlorate into the unburn- -- into -- into the unlined pits behind the facility.
>
> Q. But you don't know what they did with the perchlorate in terms of industrial waste practices of --
>
> A. Yeah. I don't know what -- they burned it or what they did with it.
>
> Q. And you don't know whether or not the perchlorate that Goodrich used at that facility and was put in the pits and burned -- you don't know whether that's in the groundwater below the facility, do you?
>
> A. I don't know.

Id., 180:10-181:5.

In fact, Ms. Jahagirdar's accusations are based solely on the allegations of the Regional Board in the proposed CAO.

> Q. You don't know. [¶] And yet, notwithstanding that fact, you write in this piece here that you've sent around, put on the Internet -- you accuse my client of having polluted the groundwater and the water resources of the City of Rialto, don't you?
>
> A. Yes. [¶] And the reference for that is the regional board order issued by the Regional Water Quality Control Board.
>
> * * *
>
> Q. But you have no idea, none, what Goodrich's contribution is to the groundwater contamination in Rialto, do you?
>
> A. Well, I know that they are considered a potentially responsible party. They've been subject to an order, a draft order, issued by the regional water board. I know that. [¶] Yeah. I mean, I'm familiar with the documents in the public record that --

Q. Okay. But hold on a second. [¶] You said they've been a potentially responsible party. [¶] [That] [d]oesn't mean they are a responsible party; right? [¶] There's no evidence you're aware of that says that their stuff is in the groundwater, is there?

A. I did not do primary research, but I am relying on the regional water board's --

Q. The regional board has issued a draft, unsigned order; right? [¶] That's what they've done; right?

A. Yeah. [¶] And then also EAD [sic] --

Q. Hold on a second. [¶] And they did that; right?

A. Uh-huh.

Q. Answer "yes" or "no" verbally, please.

A. Yes.

Id., 181:6-15, 268:15-269:16.

2. Ms. Jahagirdar possesses no expert knowledge on any relevant issue

In addition to knowing none of the relevant facts, Ms. Jahagirdar is also not an expert in any relevant scientific or medical field.

- Ms. Jahagirdar holds an undergraduate Bachelor of Science degree in "biology and history" from Yale University in 1988. *Id.*, 13:9-16.
- She is not professionally licensed in any field (e.g., engineering or geology). *Id.*, 19:20-20:7.
- She is not an expert in civil engineering. *Id.*, 69:13-14.
- She is not an expert in water distribution. *Id.*, 69:15-16.
- She is not an expert in groundwater modeling. *Id.*, 69:17-18.
- She is not an expert in hydrogeology or geology. *Id.*, 69:19-20.
- She is not an expert in the fate and transport of water. *Id.*, 69:22-24.
- She is not an expert in the movement of chemicals dissolved in water through soil. *Id.*, 69:25-70:1.
- She is not an expert in vadose zone modeling. *Id.*, 70:3-4.
- She is not an expert in epidemiology. *Id.*, 42:24-43:6.
- She is not an expert in toxicology. *Id.*, 43:8-16.

- She is not an expert in molecular biology. *Id.*, 46:18-47:5.
- She is not an expert in any medical science. *Id.*, 44:23-25.

Ms. Jahagirdar further admits having no expert knowledge upon which to accuse Goodrich (or any other entity) of legal responsibility for the perchlorate contamination.

- She does not know how Goodrich handled waste rocket propellant or perchlorate. *Id.*, 177:15-23.
- She has not reviewed any historical records of Goodrich's former operations in Rialto. *Id.*, 87:24-88:2.
- She does even know what Goodrich manufacturers, and knows only that it is an "aerospace manufacturer". *Id.*, 90:17-18.
- She does not know the difference between a missile and a rocket. *Id.*, 175:18-20.
- She does not know how much perchlorate "burns off" when rocket fuel is combusted. *Id.*, 177:2-13.
- She does not know the depth to groundwater in Rialto generally or at the 160-acre parcel. *Id.*, 179:2-4, 180:1-3.
- She does not the infiltration rates of perchlorate in soil. *Id.*, 180:6-9.
- She does not know the amount of water in the Rialto-Colton basin. *Id.*, 275:11-16.
- She does not know how many companies used perchlorate in past operations over the Rialto-Colton basin, or how many discharged waste containing perchlorate. *Id.*, 277:3-16.
- She does not know how long it takes for a surface discharge of perchlorate to travel 400 feet to the groundwater below the surface. *Id.*, 292:22-25.
- She does not know about the contribution of Chilean fertilizer to the perchlorate contamination. *Id.*, 297:17-298:1, 8-14.
- She is not an expert in the industrial practices of fireworks manufacturers. *Id.*, 70:7-9.
- She is not an expert in the industrial practices of flare or munitions manufacturers. *Id.*, 70:18-20.
- She is not an expert in the industrial practices of solid rocket manufacturing or research and development facilities. *Id.*, 70:21-23.

Moreover, while Ms. Jahagirdar holds herself out to the public as an "expert" on perchlorate and related issues, she admits having no scientific expertise on perchlorate,

its health effects in any population, its safe levels, or any appropriate cleanup standard:

Q. On this Internet website here, in your bio, you say you have expertise -- And that's the magic word there we've been talking about; right?

A. Yeah. I mean -- Okay. So the basic thing with this whole expert thing is that I, in most forums, know more about perchlorate than everybody else there and have spent a lot of time thinking about it. [¶] If you're asking if I'm going to testify as an expert at the water board proceeding, it's unlikely because I think in that forum, it's not appropriate. [¶] So does that answer your question?

* * *

Q. In scientific circles, are you an expert --

A. No.

Q. So you're not an expert in perchlorate in scientific circles; right?

A. Correct.

* * *

Q. So you're not going to testify as an expert on State and federal policies related to safe drinking water, as an expert?

A. I'm not going to characterize myself as an expert, correct.

Q. And the same thing is true of clean water and water quality?

A. Correct.

Q. And the same thing --

A. Correct, correct.

Q. Hold on. I get to ask the question. [¶] And you will not be holding yourself out as an expert in cleanup standards for toxic pollution?

A. At the State water board proceedings, correct.

* * *

Q. You're not going to be providing any documentation on cleanup levels, I take it; right?

A. What do you mean by that?

Q. Well, you know, the order talks about what is safe for the residents, okay. [¶] And in order to offer an opinion or

produce documentation on that subject, you would have to have expertise –

A. Well, at this point, we -- we don't plan to talk about specifically the toxicological debate over health effects of perchlorate at this point.

Q. So to your knowledge, that's not something you guys are introducing into the record?

A. At this point, no. We think that's not relevant to this particular proceeding.

Id., 299:24-300:9, 303:21-25, 305:24-306:12, 315:12-316:1.

In case Ms. Jahagirdar changes her mind and attempts to address these issues, it is undeniable that she has no expertise in any of these subjects.

- She is not an expert in endocrinology. *Id.*, 45:4-6.
- She is not an expert in the human kinetics of perchlorate. *Id.*, 44:6-12.
- She is not an expert on fetal brain development. *Id.*, 45:4-6.
- She is not an expert in risk assessment. *Id.*, 73:5-6.
- She is not an expert in dose response. *Id.*, 114:19-23.
- She does not know what a "No Observable Effect Level" or a "No Observable Adverse Effect Level" represents. *Id.*, 140:9-12.
- She does not know the therapeutic doses of perchlorate. *Id.*, 72:6-8.
- She does not know the safe levels of perchlorate exposure for humans. *Id.*, 251:19-23.
- She is not aware of any of the case histories of therapeutic uses of perchlorate. *Id.*, 93:3-6.
- She does not know the current therapeutic uses of perchlorate. *Id.*, 72:9-20.
- She does not know what hormones are created by the thyroid. *Id.*, 74:20-22.
- She does not know what hormones are created by the pituitary that are relevant to the thyroid. *Id.*, 74:23-75:2.
- She does not the cellular structure of the thyroid. *Id.*, 146:5-10.
- She does not know the amount of iodine necessary for normal adult thyroid function. *Id.*, 146:17-21.

- She does not know sources of iodine other than iodized salt. *Id.*, 147:2-6.
- She does not know whether Rialto residents have an iodine rich diet. *Id.*, 147:10-14.
- She does not know whether the amount of iodine makes any difference to the effect of perchlorate in adults or children. *Id.*, 147:15-148:5.
- She does not know when the fetal thyroid develops and independently produces hormones. *Id.*, 75:15-23, 76:1-4.
- She does not know how perchlorate compares to other endocrine disruptors (e.g., thiocynates or nitrates). *Id.*, 78:12-19.
- She does not know the qualifications, accomplishments, or research of key professionals in the field, such as Dr. Louis Braverman (whose name she did not ever recognize) (*id.*, 98:25-99:6), Dr. Monte Greer (*id.*, 99:7-100:13), Dr. Steven Lamm (*id.*, 170:17-171:2), or Dr. Richard Pleus (*id.*, 171:23-172:15); nor does she know anything about the universities that were involved in any of the research on perchlorate (*id.*, 101:23-102:1).
- She does not know the hypotheses that were being tested in the studies on perchlorate. *Id.*, 161:4-10.
- She does not know how the Environmental Protection Agency calculated its Drinking Water Equivalent Level of 24.5 parts per billion for perchlorate. *Id.*, 140:6-8.
- She does not know anything about the "benchmark calculations" for perchlorate or the studies on which those calculations are based. *Id.*, 258:6-13.
- She does not know the level of perchlorate that creates an adverse health effect in humans generally, or in sensitive subpopulations. *Id.*, 141:1-8.
- She does not know how much perchlorate is necessary to affect the maternal thyroid and the production of necessary hormones for fetal development. *Id.*, 195:13-16.
- She does not know how much perchlorate is necessary to affect the uptake of iodine or thyroid hormone levels in a pregnant women. *Id.*, 197:21-198:6.
- She is not aware of any evidence that any measured concentration of perchlorate in any well in Rialto is capable of causing any effect in pregnant women or a developing fetus. *Id.*, 198:7-199:2.

3. Ms. Jahagirdar also may not present the publications of Environment California or any other hearsay

Goodrich anticipates that Ms. Jahagirdar may attempt to "rely on" – *i.e.*, simply read or submit into the record – documents including the publications of Environment California on perchlorate. In addition to being inadmissible hearsay (*see* Cal. Evid. Code § 1200 *et seq.*), such commentaries are not reliable, expert analyses that deserve any weight in these proceedings. They do not contain original research, nor are they opinions of a qualified expert. In fact, Environment California's publications were not even written or reviewed by anyone with scientific expertise. They were written by a non-scientist, Travis Madsen, who is with an organization called "the Frontier Group", and then reviewed by Ms. Jahagirdar. *Id.*, 124:9-20. Mr. Madsen is paid to write these pieces for Environment California. For one report, he was paid "around the ballpark" of $10,000. *Id.*, 125:5-14.

Mr. Madsen is also not an expert in any relevant subject. All Ms. Jahagirdar knows of Mr. Madsen's background is that he does not have a Ph.D. degree in any field (she also knows nothing of the experience of anyone else at the Frontier Group). *Id.*, 150:4-151:7. According to his biography, Mr. Madsen is simply a "Policy Analyst" with a Bachelor of Arts degree from the University of California. U.S. PIRG website *available at* http://www.pirg.org/media/staff/travismadsen.html. California Environment's "reports", which include accusations about health risks from perchlorate, were not even reviewed by any expert in endocrinology, epidemiology, or toxicology. *Id.*, 151:24-152:3. In summary, these documents are advocacy pieces, not evidence, and therefore have no place in these proceedings.[159]

B. CCAEJ

Ms. Penny Newman appeared for deposition on April 3, 2007 as the Federal Rule

[159] Even Ms. Penny Newman from CCAEJ acknowledges these are not peer-reviewed, scientific publications and should not be used to draw any conclusion about potential health effects from perchlorate exposure. Newman Dep., 155:14-156:1.

of Civil Procedure, Rule 30(b)(6) representative for CCAEJ on several subjects, including "any evidence" it intends to rely in these proceedings. Ex. 20060 (Topic 2). Ms. Newman founded CCAEJ in 1993 and has been its Executive Director since that time. Newman Dep., 21:19-22:3. Mr. Davin Diaz, CCAEJ's "campaign director", was also deposed on April 5, 2007. *Id.*, 37:19-21, Diaz Dep., 191:5-7. Ms. Newman and/or Mr. Diaz may present testimony on behalf of CCAEJ. Newman Dep., 37:6-24.

CCAEJ is in no position to present evidence on any issue relevant to these proceedings. Ms. Newman and Mr. Diaz are political advocates, not witnesses with firsthand knowledge or expertise in any relevant subject.

Ms. Newman freely admits that CCAEJ is not prepared to present any relevant evidence, and its submission does not offer any suggestion to the contrary. Indeed, as of the depositions of Ms. Newman and Mr. Diaz, CCAEJ had not retained counsel to represent it in these proceedings, nor had it begun preparing any documents or visual presentation to submit or present, nor had it even decided what evidence it intends to present. *Id.*, 37:25-38:4, 38:13-15, 39:13-16, 51:8-14; *see also* Diaz Dep., 106:14-107:13. CCAEJ had not even decided if it would make any submission. Newman Dep., 38:21-23.

This indecision likely reflects the fact that CCAEJ has no relevant expert information to present at these proceedings. Ms. Newman[160] is not an expert in any relevant subject – e.g., hydrogeology, geology, fate and transport of chemicals in the environment, groundwater modeling, civil engineering, inorganic chemistry, the use of perchlorate in rocket fuel manufacturing, resulting wastes, waste management, medicine, endocrinology, the effects of perchlorate on the human thyroid, the effect of endocrine disruptors in general, epidemiology, toxicology, metabolism, molecular biology, and law. *Id.*, 82:4-14, 82:15-20, 85:15-17, 87:17-88:1, 95:13-96:11, 205:10-16,

[160] Ms. Newman holds an undergraduate Bachelor of Arts degree in "speech and language pathology" from California State University Fullerton in the "late '80s", along with some related graduate coursework. Newman Dep., 79:25-80:18, 81:12-16.

206:8-15, 209:10-12, 215:1-5, 215:22-217:19. Mr. Diaz[161] likewise concedes his lack of expertise in the subjects relevant to these proceedings – e.g., medicine, biology, toxicology, epidemiology, molecular biology, endocrinology, chemistry, biochemistry, geology, hydrogeology, risk assessment, water quality, public health, and perchlorate and its potential health effects in any population. Diaz Dep., 24:12-17, 25:13-26:20, 121:15-122:1, 176:25-177:3, 264:13-265:9, 266:25-270:21, 273:6-274:5. CCAEJ does not have experts in any relevant subject on its staff either. Newman Dep., 140:17-19, 217:20-218:21.[162] In fact, in Mr. Diaz's two-plus years working on perchlorate for CCAEJ, his "research" consisted of reviewing the Environment California's publications and he "tried reading" one original study, which he admits not understanding. Diaz Dep., 261:7-262:4, 275:6-276:9, 284:12-18.

CCAEJ also has not retained any experts or consultants on issues related to the perchlorate contamination in Rialto, including any medical or hydrogeology experts. Newman Dep., 94:12-17, 95:1-12, 218:22-219:3.[163] Ms. Newman's reasoning is that

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[161] Mr. Diaz holds an undergraduate Bachelor of Arts degree in "history" from California State University San Bernardino in 2004. Diaz Dep., 21:1-8. The only college-level science courses he took were "astronomy and astronomy lab". *Id.*, 23:20-22.

[162] Aside from these relevant subjects, Ms. Newman indicated that Mr. Diaz may present evidence that $7.2 million in water bill surcharges should be "reimbursed" to residents. Newman Dep., 52:15-56:3. This issue is briefly raised in CCAEJ's submission (see p. 7 and Ex. K). Even if this was one of the subjects relevant to these proceedings (and it is not), CCAEJ is in no position to raise this issue either. Mr. Diaz explained this is actually the County of San Bernardino's calculation, not his, and he does not know how that number was calculated. Diaz Dep., 189:16-190:20. CCAEJ also has not retained an expert in accounting or, in particular, forensic accounting, Mr. Diaz is not such an expert, and CCAEJ does not have an accountant or economist on staff. Newman Dep., 228:16-21, 239:20-23.

[163] Mr. Diaz testified that he has spoken with several lawyers about possibly serving as an unpaid, legal expert on "the California Water Code", but he has not identified any qualified and willing candidate for that role. Diaz Dep., 149:12-150:13, 158:17-161:4, 163:24-167:21.

Otherwise, Mr. Diaz's only contact with experts of any kind are an unnamed person from a company named "Simion" and Dr. Brett Stanley, a chemistry professor at California State University San Bernardino, about potential perchlorate remediation using "ion exchange systems", but neither will testify. *Id.*, 111:21-113:19, 144:15-24. Dr. Stanley also told Mr. Diaz that he accepts U.S. EPA's level of "24 parts per billion" as a cleanup standard for perchlorate, but Mr. Diaz was not interested in learning why. *Id.*, 114:17-

expert testimony is unnecessary because these proceedings will simply address a lay-person "public policy issue". *Id.*, 94:18-25.

Were there any doubt about Ms. Newman's intention to turn this proceeding into her personal political soapbox, she openly admits that CCAEJ does not intend to present evidence and, instead, it intends to make a "public policy" presentation based on her "personal" opinions and in support of CCAEJ's "campaign" on perchlorate.

> Q. Now, am I correct, to the best of your knowledge as you sit here today, if CCAEJ addresses the issue of the cleanup level for perchlorate in Rialto, if they do it in the state board proceeding, you're going to be advocating a zero cleanup level; right?
>
> A. I think the position that we've stated is that we want to clean up to the best available technology.
>
> Q. What is your definition of "best available technology"?
>
> A. Whatever is the most current that does the most thorough job.
>
> Q. No matter how much it costs; right?
>
> A. Correct.
>
> Q. So literally, anything, that no matter how expensive it is, is what you want for the Rialto water -- right? -- for perchlorate?
>
> A. Correct.
>
> Q. In fact, if they can't get it to zero, what you would like to have is the polluters just buy water that has no perchlorate in it; isn't that right?
>
> A. That is correct.
>
> Q. Not one molecule of perchlorate is going to be good enough for you; correct?
>
> A. From my personal standing, yes.
>
> Q. And there's no other contaminant in the Rialto water supply that you've looked at except for perchlorate; correct?
>
> A. This particular campaign, we're looking for perchlorate.
>
> * * *

115:5. Mr. Diaz does not intend to contact anyone else to offer any type of expert opinion in these proceedings. *Id.*, 172:8-11.

Q. So I want to make sure I'm clear. CCAEJ's position today is that the level of perchlorate that should be allowed in drinking water is zero and definitely below a level that can be detected by current technology; correct?

A. Our position is that public policy shall be set on no contaminant in the drinking water, and that's the goal, that you use the best available technology to get as far down to that as possible.

Q. But your best available technology is any effort, no matter how much it costs; right?

A. Correct.

Q. So like I say, isn't it always provide water that has zero or at least nondetect of any contaminant that you're worried about?

A. Perchlorate specifically, yes.

Q. I mean, we went over this this morning. I don't want to plow old ground. We did it before. But the fact is, CCAEJ's position is what the polluters should be doing is giving the residents of Rialto water that has not one molecule of perchlorate in it; correct?

A. Correct.

Id., 73:18-74:21, 84:14-85:11. Indeed, the opening paragraph of Environment California and CCAEJ's joint submission confirms that they will only present "policy arguments".

Consistent with Ms. Newman's "political" plan for these proceedings, CCAEJ has not actually investigated whether Goodrich or any other company is responsible for the perchlorate contamination, notwithstanding the public accusations it has made against Goodrich and other companies. *Id.*, 223:4-11; Diaz Dep., 249:8-250:1, 251:1-20. All that CCAEJ knows about potentially responsible parties are what is found in the "records" from the Regional Board and "the EPA order from 2003". Newman Dep., 43:23-44:5. CCAEJ's review did not include transcripts of any depositions of former Goodrich employees (*id.*, 45:20-24), records of Goodrich's (or any other company's) historic operations (*id.*, 47:3-25, 48:25-49:6), or any investigation of potential polluters beyond those identified by the Regional Board or EPA (*id.*, 50:15-51:7).

Ms. Newman readily concedes that CCAEJ has conducted no investigation into which companies and entities may be responsible for the perchlorate contamination;